Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1995

SUSAN M. POWER,

Petitioner,

v.

ALEXANDRIA PHYSICIANS GROUP, LIMITED; BENEDICT J. SEMMES, M.D.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the Emergency Medical Treatment and Active Labor Act presents liability and damage claims that are separate and distinct from liability and damage claims available under state medical malpractice laws?

2. Whether an individual who is awarded damages in an action under the federally enacted Emergency Medical Treatment and Active Labor Act is barred from pursuing a separate state law medical malpractice claim by virtue of a state law limitation on the amount of damages that may be awarded?

PARTIES TO THE PROCEEDING

The parties to this proceeding were the sole parties to the proceeding below, which was captioned Susan M. Power v. Alexandria Physicians Group, Ltd., and Benedict J. Semmes, M.D. Petitioner, Susan M. Power, is a private individual from the United Kingdom who was residing in the State of Virginia when she suffered her physical injuries by the acts and omissions of the Respondents. Respondent, Alexandria Physicians Group Ltd., previously certified to the Court of Appeals below that it is not a parent, subsidiary, or affiliate of any publicly held corporation, or other publicly held entity. Respondent, Benedict J. Semmes, M.D., is an emergency room physician who is licensed in the State of Virginia.

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Petitioner Susan M. Power respectfully prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Fourth Circuit, which was entered on July 3, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. (Appendix "App" at A-1). The per curiam disposition of the Court of Appeals, affirming in its entirety the judgment of the United States District Court for the Eastern District of Virginia, was entered on July 3, 1996. The decision of the District Court was entered on May 18, 1995 and is reported as Power v. Arlington Hospital, 887 F.Supp. 845 (E.D. Va. 1995). (App. at A-5).

STATEMENT OF JURISDICTION

Petitioner brought an action in the United States District Court for the Eastern District of Virginia, based on diversity jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332. (App. at A-30). On May 18, 1995, the District Court dismissed petitioner's complaint. Petitioner pursued a timely appeal under 28 U.S.C. § 1291.

The judgment of the Court of Appeals, for which review is now sought,

was entered on July 3, 1996, affirming the District Court's entry of a dismissal order. (App. at A-1). The jurisdiction of this Court is now invoked under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL STATUTES AND REGULATIONS

The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd:

§ 1395dd. Examinations and treatment for emergency medical conditions and women in labor

(a) Medical screening requirement

In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

(b) Necessary stabilizing treatment for emergency medical conditions and labor

(1) In general

If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either-

(A) with the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

* * *

(d) Enforcement

(1) Civil money penalties

(A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of

not more than $50,000 (or note more than $25,000 in the case of a hospital with less than 100 beds) for each such violation. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under this subparagraph in the same manner as such provisions apply with respect to a penalty or proceeding under section 1320a-7a(a) of this title.

(B) Subject to subparagraph (c), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section, including a physician who-

> **(i)** signs a certification under subsection (c)(1)(A) of this section that the medical benefits reasonably to be expected from a transfer to another facility outweigh the risks associated with the transfer, if the physician knew or should have known that the benefits did not outweigh the risks, or

(ii) misrepresents an individual's condition or other information, including a hospital's obligations under this section,

is subject to a civil money penalty of not more than $50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this subchapter and State health care programs. The provisions of section 1320(a)-7a of this title (other than the first and second sentences of subjection (a) and subsection (b)) shall apply to a civil money penalty and exclusion under this subparagraph is the same manner as such provisions apply with respect to a penalty, exclusion, or proceeding under section 1320a-7a(a) of this title.

(C) If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians (required to be maintained under section 1396cc(a)(1)(I) of this title) and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the

physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not be subject to a penalty under subparagraph (B). However, the previous sentence shall not apply to the hospital or to the on-call physician who failed to appear.

(2) Civil enforcement

(A) Personal harm

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(B) Financial loss to other medical facility

Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this

section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of the State in which the hospital is located, and such equitable relief as is appropriate . . . .

* * *

(f) Preemption

The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

(g) Nondiscrimination

A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of a individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

(h) No delay in examination or treatment

A participating hospital may not delay provision of an appropriate medical

screening examination required under subsection (a) of this section or further medical examination and treatment required under subsection (b) of this section in order to inquire about the individual's method of payment or insurance status.

STATEMENT OF THE CASE

Early on the morning of February 24, 1990, Susan M. Power, a citizen of the United Kingdom who had no insurance, presented to the emergency room at Arlington Hospital in Arlington, Virginia. Power v. Arlington Hospital, 887 F.Supp. 845, 846 (E.D. Va. 1995) (hereinafter, collectively, "Power III")[1] She was unable to walk, had chills, and complained of pain in her hip, abdomen, back and legs. Id. A sizeable boil was present on her cheek. She was visited by Dr. Semmes, an employee of Alexandria Physician Group, her vital signs were taken, a "dipstick" urinalysis was performed, and a more extensive urinalysis was ordered. No blood studies or other tests were ordered. Approximately two hours later, and despite the absence of any diagnosis, treatment or determination as to whether

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[1] It is the Court of Appeals' per curiam affirmance of the District Court decision that is before this Court.

she was suffering from an emergency medical condition, Ms. Power was discharged from the hospital with aspirin and told to report back to the hospital if her condition worsened. Id.; See also App. at A-35-38.

At approximately 10:00 a.m., the results of Ms. Power's urinalysis, which evidenced the presence of a serious blood infection, were reported back to the emergency room and Dr. Semmes. The results were not communicated to Ms. Power and Dr. Semmes took no action.

Midday on the 24th of February, a friend of Ms. Power telephoned the Arlington Hospital emergency room and informed the emergency room physicians that Ms. Power's condition was worsening. App. at A-37. Ms. Power was instructed to double her dosage of aspirin, but she was not instructed to return to the hospital, her urinalysis results were not disclosed and no physical examination was requested. More phone calls were made to the emergency room later that day and the next in which Ms. Power's worsening condition was related. Still, no action or direction was offered by the emergency room physicians or staff.

Finally, her condition having so significantly diminished, Ms. Power was transported to the Arlington Hospital emergency room on the evening of February 25, 1990. Power III, 887 F.Supp. at 846. Upon readmission, Ms. Power was again

misdiagnosed and improperly treated. App. at A-38-42.

Ms. Power, suffering from a serious blood infection that disabled her entire body and its systems, was hospitalized in the intensive care unit for four months, during which time she underwent the amputation of both legs below the knees, suffered a damaged brain stem, lost sight in one eye, and developed severe and permanent lung damage. Power III, 887 F.Supp at 846. Without any insurance to pay for continued care and rehabilitation, Ms. Power was unilaterally discharged by her health care providers at the end of her fourth month in the intensive care unit back to London, England. Id.

Ms. Power simultaneously filed a federal claim under the Emergency Medical Treatment and Active Labor Act (hereinafter "EMTALA") and a separate state law medical malpractice claim against Arlington Hospital, the emergency room physicians, and Alexandria Physicians Group, the physician practice group which operated the emergency room, in the United States District Court for the Eastern District of Virginia. App. at A-30. The state law action was stayed pending resolution of Ms. Power's EMTALA claim.

Dr. Semmes and APG were dismissed from the EMTALA action prior to the commencement of discovery on the basis that an EMTALA action could only be

asserted against a hospital. Prior to trial, the District Court determined that Virginia's state malpractice cap of one million dollars did not apply to an EMTALA claim. Power v. Arlington Hospital, 800 F.Supp. 1384 (E.D. Va. 1992) (hereinafter, collectively, "Power I"). On August 28, 1992, a jury found that an appropriate medical screening, as required by EMTALA, had not been provided to Ms. Power, and therefore the jury awarded Ms. Power five million dollars in damages based solely upon Arlington Hospital's violation of the federal EMTALA statute. (App. at A-29).

Arlington Hospital, the sole defendant in the EMTALA action, appealed both the jury's verdict and the five million dollar award to the Fourth Circuit Court of Appeals. The Court of Appeals held the jury's finding of an EMTALA violation was supported by the facts and evidence adduced at trial, and affirmed that portion of the verdict. Power v. Arlington Hospital, 42 F.3d 851, 869 (4th Cir. 1994) (hereinafter, collectively, "Power II").[2] However, by

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[2] The court held, *inter alia:*

> "In conclusion, we uphold the jury's verdict in favor of Power on her (sic) failure to provide an appropriate screening claim under EMTALA as consistent with the legal standard for recovery under EMTALA articulated herein."

a two-to-one majority, the Court of Appeals upheld the one million dollar ceiling imposed by the Virginia Medical Malpractice Act, applied the statute to limit Ms. Power's recovery under her EMTALA claim, and remanded the case to the District Court for an appropriate determination of damages under the malpractice cap.[3]

The Court of Appeals reasoned that because Virginia law defines malpractice as "any tort based on health care," the EMTALA claim should "be deemed a malpractice claim under the Virginia Medical Malpractice Act." Power II, 42 F.3d at 861. This finding focused solely on the issue of "availability of damages" for purposes of defining a remedy for the federal EMTALA claim. The Court of Appeals went on to state that application of the one million dollar malpractice cap did not directly conflict with EMTALA's goals. Id. at 863-864. Moreover, the Court of Appeals indicated its awareness of the separate medical malpractice action filed against the Respondents. However, the Court of Appeals did not specifically address the effect of its holding on a pending or future state malpractice claim brought by the same EMTALA plaintiff, nor did it suggest that its decision should be interpreted to

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[3] Upon remand, the District Court reduced Ms. Power's award to one million dollars.

foreclose any such action by Ms. Power or any similarly situated EMTALA plaintiff.

In fact, the Court of Appeals explicitly affirmed its position as stated in prior cases[4] that EMTALA actions and state malpractice actions are wholly separate and distinct:

> This conclusion does not undermine our clear holdings in Brooks and Baber that EMTALA was not intended to displace state malpractice law and its purpose is not `to guarantee that all patients are properly diagnosed, or even to ensure that they receive adequate care.' Brooks, 996 F.2d at 711; Baber, 977 F.2d at 880. We continue to adhere to these holdings, and wholeheartedly agree with the district court's view that there are `sharp differences between a medical malpractice action and an EMTALA action,' and that `they are separate and distinct causes of action focused on different conduct and aimed at

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[4] See Brooks v. Maryland General Hospital, 996 F.2d 708 (4th Cir. 1993) and Baber v. Hospital Corporation of America, 977 F.2d 872 (4th Cir. 1992).

different goals.' 800 F.Supp. at 1390.

Power, 42 F.3d at 864.

With the stay lifted in the state law malpractice action as a result of final action on the EMTALA claim, Respondents moved to dismiss, arguing that because the Court of Appeals applied the malpractice cap to the damage award in the EMTALA action against Arlington Hospital, Ms. Power's ability to recover any damages against the individual physicians for separate acts of malpractice incurred through the course of her 1992 medical treatment had been exhausted. Ms. Power argued that Respondents' position would extend the application of a state damage limitations on EMTALA in a manner never before contemplated by the United States Congress, that would eviscerate the purposes and effects of EMTALA. Power further argued that such an unprecedented extension was unwarranted, contrary to public policy, and contrary to federal law. Notwithstanding, the District Court dismissed Ms. Power's state law action, Power III, and the dismissal was affirmed per curiam by the United States Court of Appeals for the Fourth Circuit. App. at A-1.

EMTALA claims and state law medical malpractice claims are separate and distinct causes of action, aimed at different wrongful acts, with different

goals, and involving different defendants. Ms. Power brought her present state law action, Power II, seeking recovery for tortious acts on the part of Dr. Semmes and APG. These tortious acts were entirely separate from those successfully prosecuted in Ms. Power's EMTALA claim against Arlington Hospital.

To properly redress the wrongs Ms. Power suffered by these separate injurious acts, and to fulfill the distinct purposes of EMTALA and state law, Ms. Power is entitled to separate recoveries and separate caps for each of her two claims. Therefore, the District Court's holding in Power III, and the Court of Appeals' affirmance, that Ms. Power's EMTALA recovery bars any further pursuit of state law claims against health care providers who committed separate independent tortious acts upon her, must be reversed.

REASONS FOR GRANTING THE WRIT

I. THIS COURT MUST DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT PRESENTS LIABILITY AND DAMAGE CLAIMS THAT ARE SEPARATE AND DISTINCT FROM LIABILITY AND DAMAGE CLAIMS AVAILABLE UNDER STATE MEDICAL MALPRACTICE LAWS.

The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. 1395dd, (hereinafter "EMTALA") created a federal cause of action aimed at eliminating "`patient dumping' - the practice of refusing to provide emergency medical treatment to patients unable to pay or transferring them before emergency conditions were stabilized ." Power II, 42 F.3d at 856. An EMTALA claim is a strict liability claim. Power I, 800 F.Supp. at 1387 (E.D. Va. 1992). If a hospital fails to act, it is strictly liable for its failure. Id. "In short, the issue is not whether the Hospital's treatment was adequate as measured against a malpractice standard of care, ... but rather whether the claimant received the same screening examination regularly provided to their patients in similar circumstances." Power II, 42 F.3d at 859, citing 800 F.Supp. at 1387, n.6. In addition, EMTALA authorized actions only against "participating

hospitals". Power I, 800 F.Supp. at 1386. Physicians and physician practice groups are not subject to liability under the Act. Baber, 977 F.2d at 877-878.

By contrast, Ms. Power's separately filed and asserted medical malpractice claim is a state-created cause of action based upon misdiagnosis or an improperly performed medical procedure, governed by the common law of Virginia and augmented by Virginia's statutory scheme. Code of Virginia 8.01-581.1-.20 (Michie 1992). The state law claim is a traditional medical malpractice/negligence claim which alleges a breach of the prevailing standard of care. It arises under a state statutory scheme which seeks to deter negligent conduct by all health care providers, "i.e., conduct that fails to meet the relevant standard of care." Power I, 800 F.Supp. at 1389, n.15.

The tortious acts which gave rise to Ms. Power's EMTALA claim were separate and distinct from those tortious acts which serve as a basis for her state law malpractice claim. In the EMTALA action, Arlington Hospital was found liable for its failure to provide an appropriate medical screening because of its failure to perform blood tests on Ms. Power at approximately 7:00 a.m. on February 24, 1990. The jury's verdict in the EMTALA action reads as follows:

> WE, THE JURY, FIND: Plaintiff's claim of inappropriate medical

screening on or about 2/24/90 . . . In favor of the plaintiff, SUSAN M. POWER, against the defendant, ARLINGTON HOSPITAL ASSOCIATION. . . Damages Awarded in the amount of $5,000,000.00."

App. at A-29.

a. The state law medical malpracta. The emergency room physicians and APG breached the prevailing standard of care when they misdiagnosed urinalysis results reported to them at approximately 10:00 a.m. on February 24, 1990, several hours after the EMTALA violation and Ms. Power's exit from Arlington Hospital. A separate and distinct act from the EMTALA violation;

b. The emergency room physicians and APG breached the prevailing standard of care when they advised Ms. Power to double her dosage of aspirin without any examination or evaluation during a midday phone call made to the emergency room

physicians on February 24, 1990 in which APG and the emergency room physicians were advised that Ms. Power's condition was worsening. Again, a separate and distinct act from the EMTALA violation;

c. The emergency room physicians and APG breached the prevailing standard of care when they misdiagnosed Ms. Power's condition during subsequent telephone inquiries to the emergency room physicians and APG between midday on February 24, 1990 and midday on February 25, 1990. Again, acts and omissions of negligence separate and distinct from the EMTALA violation on February 24, 1990;

d. The emergency room physicians and APG breached the prevailing standard of care when they misdiagnosed and improperly treated Ms. Power's condition beginning at approximately 10:00 p.m. on February 25,

> 1990 when she was admitted to the emergency room. Again, acts of negligence separate and distinct from the EMTALA violation of February 24, 1990.

On the basis of these alleged negligent acts, Ms. Power has brought the present action.

Clearly different predicate acts and evidence were presented for the EMTALA action than would be required for a medical malpractice action. Wholly different defendants are also involved in the present action.[5]

Moreover, the two actions involve different types of remedies for different types of injuries. EMTALA establishes a federal statutory remedy for failure to provide emergency medical treatment. A medical malpractice action under Virginia law addresses injuries suffered as a result of treatment not in conformity with the prevailing standard of care. That the two actions address different injuries and have different goals was recognized by the Fourth Circuit:

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[5] Respondents, APG and Semmes, the defendants in Ms. Power's medical malpractice action, could not be held liable under EMTALA. Power I, 800 F.Supp. at 1386.

> As we have stated, Congress enacted EMTALA to address a growing concern with preventing "patient dumping," the practice of refusing to provide emergency medical treatment to patients unable to pay, or transferring them before emergency conditions were stabilized. Baber, 977 F.2d at 880; Brooks, 996 F.2d at 710; Baby K, 16 F.3d at 593. EMTALA is not a substitute for state law malpractice actions, and was not intended to guarantee proper diagnosis or to provide a federal remedy for misdiagnosis or medical negligence. Baber, 977 F.2d at 880; Brooks, 996 F.2d at 710.

Power II, 42 F.3d at 856; see also, Power I, 800 F.Supp. at 1387-88.

Virtually every decision addressing EMTALA has recognized that Congress did not intend for the Act to be a substitute for a state medical malpractice action." Power II, 42 F.3d at 869; Vickers v. Nash General Hospital, 78 F.3d 139, 142 (4th Cir 1996). In fact, EMTALA was not intended "to duplicate preexisting legal protections, but rather to create a new cause of action, generally unavailable under state tort law, for what amounts to failure to treat." Id. The focus of EMTALA is on the deficiency of the

initial screening examination. Id. at 143. EMTALA "does not impose any duty on a hospital requiring that the screening result in a correct diagnosis." Brooks, 996 F.2d at 711. The accuracy of the diagnosis remains the exclusive province of local negligence and malpractice law. Vickers, 78 F.3d at 143. Thus, treatment decisions based on medical judgment fall outside the Act. Id. at 144.

Since EMTALA and state medical negligence claims are separate and distinct, it naturally follows that each claim is entitled to separate damage remedies. If the District Court and Court of Appeals' decision in Power III is allowed to stand, a successful plaintiff will be precluded from pursuing legitimate state law claims. Conversely, a plaintiff who first succeeds on a state law claim will effectively be barred from pursuing an EMTALA claim if the plaintiff realizes a damage award for the full sum of damages available under state statutory malpractice damages limitations provisions.

II. THIS COURT MUST DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER A STATE LAW LIMITATION ON DAMAGES NEGATES THE REMEDIES AVAILABLE TO AN INDIVIDUAL WHO HAS BEEN HARMED THROUGH A VIOLATION OF THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT.

There is a substantial and clear distinction between an EMTALA claim and a traditional state law malpractice claim. They require different predicate acts, employ different standards of liability, reach different defendants, and address separate wrongs. Id. ("Thus the EMTALA and malpractice schemes are separate and distinct, each aimed at different conduct for different reasons. [citation omitted]").

The decision by the Court of Appeals affirming the dismissal of Ms. Power's state law action effectively strips EMTALA of any significance, improperly interferes with state law malpractice claims in violation of the stated purposes of EMTALA, and overlooks provisions of Virginia state law regarding applications of the medical malpractice cap. An examination of the statutory language of EMTALA demonstrates that Congress did not intend for medical malpractice caps to apply to claims brought under EMTALA. The present action has borne out the inherent conflict

between the Court of Appeals' reasoning in Power II (a federal EMTALA claim against the hospital is separate and distinct from a malpractice action against a physician) and the result of Power III (recovery in a state malpractice action against a physician is barred if the hospital has paid the malpractice "cap" limit for an EMTALA claim). For the reasons set forth below, Power III must now be reversed.

With the enactment of EMTALA, Congress sought to prevent hospitals from dumping individuals who presented to an emergency room.[6] It is evident in EMTALA's legislative history that Congress sought to deter hospitals from dumping patients and to compensate such victims for all harms suffered as a result of such actions.[7] The title of the Section in question is "Civil Enforcement" and the applicable Subsection is entitled "Personal Harm." Indeed, the precise language used in Section 1395dd(d)(2)(A) establishes that nowhere in the EMTALA statute does

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[6] See, H.R. Rep. No. 241, 99th Cong., 2d Sess. 27, Reprinted in 1986 U.S.C.C.A.N. 42, 605.

[7] See, e.g., H.R. Rep. No. 241, 99th Cong., 1st Sess., pt.1 at 28; S. Rep. 146, 99th 1st Sess. passim; Conf. Rep. No. 453, 99th Cong., 1st Sess. at 476; see also H.R. Rep. No. 531, 100th Cong., 2nd Sess. at 19 (hearing on impact of "patient dumping" in the United States).

Congress indicate any intention to "limit" the damages available to an EMTALA plaintiff. Rather, Congress employed the broadest terms possible to allow recovery of those damages available for personal injury for all "personal harm" to the Plaintiff. This broad reference to state personal injury law, along with the words "and such equitable relief as is appropriate," plainly indicate that Congress wished to afford EMTALA patients the broadest recovery for possible personal harm.

It is readily apparent from reading § 1395dd(d)(2)(A) that the words "medical malpractice" do not appear anywhere in the statute. If Congress had specifically intended to limit recovery under EMTALA to specific damage ceilings found in state malpractice statutes, Congress would have made specific reference to state medical malpractice acts. As one court has observed when examining the legislative intent, "had Congress desired to enact a more restrictive statute, presumably it would have done so." Jones v. Wake County Hospital System, Inc., 786 F.Supp. 538, 543 (E.D.N.C. 1991).

In Brown v. Gardner, 115 S.Ct. 552, ____ U.S. ____, (1994), this Court examined whether a federal statute aimed at providing veterans with compensation for injuries suffered at VA facilities incorporated elements of fault. The specific statutory language read: the "VA

will compensate for `an injury or an aggravation of an injury' that occurs `as a result of hospitalization, medical or surgical treatment....'" Id. at 554. The statutory language in question did not reference or use the word "fault." Notwithstanding, VA hospitals sought such a construction in order to limit their liability.

The VA first claimed that the notion of fault was implicit in the statute's use of the term "injury." Justice Souter, writing for a unanimous Court, disagreed. The statute neither incorporated such a concept into its use of the term "injury" nor was the language used by Congress ambiguous such that statutory interpretation was required. Id. at 555.

The VA further claimed that the "as a result of" language incorporated a fault test. This was unanimously rejected by this Court as "implausible." Id. at 555. Using a plain language analysis, this Court found that the statute merely required a causal connection between the injury and one's hospitalization at a VA facility in order to recover. "Without some mention of the VA's fault, it would be unreasonable to read the [statute] as imposing a burden of demonstrating [fault] upon seeking compensation for a further disability." Id. at 556. "In sum, the text and reasonable inferences from it give a clear answer against the Government, and

that, as we have said, is `the end of the matter.'" Id. at 556. (citations omitted).

This Court's analysis is directly applicable to EMTALA. Reading into EMTALA's reference to "personal injury" a state malpractice damage limit is not only in conflict with Brown but frustrates Congressional intent.

Under EMTALA, Congress provided that:

> Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate.

42 U.S.C. § 1395dd(d)(2)(A) (emphasis added). In sum, EMTALA's purpose is one of deterrence and compensation. An EMTALA claim is not malpractice, and the statute does not speak in terms of limitation.

At the heart of the District Court's decision and the decision by the Court of Appeals in Power III is their refusal to acknowledge and account for a fundamental

distinction between the injuries inflicted upon Ms. Power through the suffering of separate wrongful acts. An injury is the invasion of a legally protected interest. Restatement of Torts, Second, Sec. 7. Two of Ms. Power's legally protected interests were invaded on separate occasions in February 1990. First, on February 24, 1990, the Hospital failed to provide her with an appropriate medical screening as required by EMTALA. Second, later that day and the following day, Dr. Semmes and the other emergency room staff, failed to meet their duties under the prevailing standard of care to properly diagnose the infection detected in Ms. Power's urinalysis, and to conduct a further examination of her upon being informed of her worsening condition on several occasions over the two day period.

Just as EMTALA did not seek to create a federal medical malpractice cause of action, neither did it seek to emasculate state law remedies already available, or to excuse the otherwise actionable conduct of individual doctors, physicians groups, or other health care providers. Yet, if the decisions of the District Court and the Court of Appeals in Power III are affirmed, the result will be just such a contradictory and inequitable outcome.

The following analogy of the District Court decision is instructive:

> "[A] malpractice claimant may not avoid the cap limit simply by identifying additional health care providers as having contributed to the malpractice injury. In other words, if seven doctors' concurrent malpractice injures a patient, she may recover up to $1 million, not $7 million."

Power v. Arlington Hospital, 887 F.Supp. at 849 (emphasis added). However, as noted above, the alleged acts of malpractice and the violation of EMTALA were not "concurrent" injurious acts. Rather, they were consecutive, separate, and distinct acts separated by time, place and circumstance, and amounting to invasions of wholly separate legal interests held by Ms. Power. The District Court's analogy to concurrent acts is therefore inapplicable to the present case. Applying the medical malpractice cap[8] to meld such grossly

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[8] § 8.01-581.15 of the Code of Virginia (Michie 1992) states:

> In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after October 1, 1983, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable

disparate wrongful acts was clearly not contemplated by the U.S. Congress in the enactment of EMTALA.

Lost in the discussion of the malpractice statute are the purposes of the underlying common law causes of action for traditional malpractice based upon negligence and breach of the standard of care. The common law allowed a full economic recovery for any injury based upon malpractice. The purposes of allowing recovery for malpractice are not only to compensate the plaintiff, but to deter violations of the standard of care by imposing liability against offending health care providers. The statutory scheme, including the cap, was enacted to modify the common law malpractice rules Virginia follows. It is a well-established rule that statutes enacted in derogation of the common law are to be construed narrowly. Jones v. General Motors Corp., 856 F.2d 22, 24 (4th Cir. 1988); Blake Construction v. Alley, 233 Va. 31, 353 S.E.2d 724, 726 (Va. 1987).

Application of the malpractice cap as urged by Dr. Semmes and APG would effectively render EMTALA a shield to liability for individual doctors whether or not they might be liable for their own independent acts of medical negligence

(..continued)

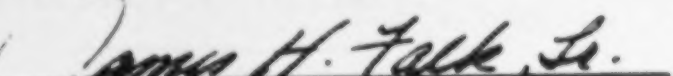
> for any injury to, or death of, a patient shall not exceed one million dollars. (emphasis added).

and professional malpractice. Such a construction would give EMTALA the effect of preempting and eliminating state law causes of action for malpractice.[9] This is exactly opposite and contrary to the purposes established by the statutory language, the legislative history and every federal court decision interpreting EMTALA.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted
THE FALK LAW FIRM, plc

by: 

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[9] 42 U.S.C. § 1395dd(f) states:

"[t]he provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section."

Power II, 42 F.3d at 863, n.10.

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No. _____

In The

Supreme Court of the United States

October Term 1995

SUSAN M. POWER,

Petitioner,

v.

ALEXANDRIA PHYSICIANS GROUP, LIMITED; BENEDICT J. SEMMES, M.D.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUSAN M. POWER,
Plaintiff-Appellant,

v.

ALEXANDRIA PHYSICIANS GROUP, LIMITED; BENEDICT J. SEMMES, M.D.,
Defendants-Appellees,

and

ARLINGTON HOSPITAL ASSOCIATION,
Defendant.

No. 95-2280
(CA-92-1288-A)

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis, III, District Judge.

Argued: April 5, 1996
Decided: July 3, 1996
Entered: July 3, 1996

Before ERVIN, Circuit Judge, PAYNE, United States District Judge for the Eastern District of Virginia, sitting by designation, and KELLAM,* Senior United States District Judge for the Eastern

District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

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* Senior Judge Kellam heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C. § 46(d).

COUNSEL

ARGUED: John Mansfield Falk, THE FALK LAW FIRM, P.L.C., Washington, D.C., for Appellant. Edward Anthony Gonsalves, GODARD, WEST & ADELMAN, Fairfax, Virginia, for Appellees. **ON BRIEF:** James H. Falk, Sr., James H. Falk, Jr., Robert K. Tompkins, THE FALK LAW FIRM, P.L.C., Washington, D.C., for Appellant. Gary Albert Godard, GODARD, WEST & ADELMAN, Fairfax, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Susan M. Power obtained a verdict in the amount of $5 million against Arlington Hospital Association under the Emergency Medical Treatment and Active Labor Act ("EMTALA") in recompense for personal injuries Power sustained as a result of the hospital's failure to provide an appropriate screening examination within the meaning of EMTALA. Power v. Arlington Hospital Ass'n, 800 F. Supp. 1384 (E.D. Va. 1992) ("Power I"). While the verdict in Power I was on appeal to this court, Power instituted an action for malpractice against the hospital, the Alexandria Physicians Group, Limited and Dr. Benedict J. Semmes. Thereafter, this court decided Power I. Power v. Arlington Hospital Ass'n, 42 F.3d 851 (4th Cir. 1994). As a result, the verdict of $5 million in Power I was reduced to $1 million.

Power then revived the dormant malpractice action and consented to the dismissal of the hospital as a defendant on the ground that it had been held liable already in Power I. The remaining defendants, Dr. Semmes and Alexandria Physicians Group, Limited, moved for dismissal contending that the $1 million EMTALA award in Power's favor in Power I constituted the entire amount recoverable by because of Virginia's $1 million

medical malpractice cap. Va. Code Ann. § 8.01-581.15 (Michie 1992). Power opposed dismissal on the theory that a second cap in the amount of $1 million was available in her malpractice action against Dr. Semmes and Alexandria Physicians Group, Limited. The district court, relying principally upon this court's decision in Power I, accepted the defendants' contention and granted their motion to dismiss the complaint in this action.

We have reviewed the district court's opinion, the record, the briefs and the contentions advanced by both parties at oral argument and find no reversible error. Accordingly, we affirm the decision of the district court on the reasoning of that court. Power v. Alexandria Physicians Group, Limited, 887 F. Supp. 845 (E.D. Va. 1995).

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF VIRGINIA
ALEXANDRIA DIVISION

SUSAN M. POWER,
Plaintiff,

v.

ARLINGTON PHYSICIANS GROUP, LTD., ET AL.,
Defendants.

CIVIL ACTION NUMBER: 92-1288-A

Entered May 18, 1995

MEMORANDUM OPINION

At issue in this medical malpractice action is whether Virginia's $1 million statutory limit on medical malpractice damages[1] bars a patient from recovering additional damages for certain injuries where, as here, the patient has already won a$1 million judgment against a hospital for the same injuries based on the hospital's violation of the Federal Emergency Medical Treatment and Active Labor Act (EMTALA).[2] In other words, the question presented is whether the medical malpractice damages cap bars recovery for malpractice injuries for which the

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1 Va. code § 8.01-581.15.

2 42 U.S.C. §§ 1395dd.

plaintiff already recovered the cap limit in an EMTALA suit against the hospital.

The patient involved, Susan Power, contends that she is entitled to two separate $1 million caps, one for her EMTALA claim and one for her state-law malpractice claim, because the two involve different defendants, different causes of action, and different wrongful acts. Yet, statutory language and judicial precedent compel the conclusion that having recovered $1 million for her malpractice injuries in an EMTALA suit, Power cannot recover any damages for the same injuries in a second malpractice action. As a result, defendants' motion to dismiss must be granted.

I.

On the morning of February 24, 1990, plaintiff Susan Power arrived at Arlington Hospital's (the "Hospital") emergency room, unable to walk, and complaining of chills and pain in her hip, abdomen, back, and legs. The Hospital's emergency department was operated under contract by Alexandria Physicians Group (APG), a Virginia corporation. Power was examined by two physicians employed by APG, Mitchell Heiman and Benedict J. Semmes, as well as by two nurses. None of the four noticed a sizable boil that was visible on Power's cheek. Although neither doctor reached a definite diagnosis, Power was

discharged from the emergency room and told to return if her condition worsened. It soon did. The next evening, Power returned to the emergency room and was diagnosed as suffering from septic shock. She remained hospitalized for four months. During this time, among other complications, she underwent the amputation of both legs below the knees, lost her sight in one eye, and developed severe and permanent lung damage. Doctors ultimately determined that Power's illness arose when she "seeded" an infection in her blood in attempting to lance the boil on her cheek. After four months — at the Hospital, Power was airlifted to a hospital in her hometown of London, England.

Power subsequently filed a suit against the Hospital[3] alleging violation of the Emergency Medical Treatment and Active Labor Act (EMTALA). See 42 U.S.C. §§ 1395dd.[4] The first EMTALA count

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[3] Power's EMTALA claims were also brought against several other defendants, including Dr. Semmes and APG. Prior to trial, the Court dismissed all defendants except the Hospital on the ground that EMTALA authorizes actions only against "participating hospitals." See 42 U.S.C. § 1395dd; Power v. Arlington Hosp. Assn., 800 F.Supp. 1384, 1386 (E.D.Va. 1992), *aff'd in part and rev'd in part*, 42 F.3d 851 (4th Cir. 1994).

[4] This suit also included two counts based on state law, a battery claim and a claim for emotional distress. Prior to trial, the Court

charged the Hospital with failing to provide an appropriate screening examination on Power's first visit to the emergency room. A second EMTALA count related to Power's transfer to the British hospital. The parties filed cross motions in limine concerning the affect of Virginia's $1 million dollar medical malpractice cap, see Va. Code § 8.01-581-15, and Virginia's limitation on tort liability of charitable hospitals to the greater of $1 million or the hospital's insurance limits, see Va. Code § 8.01-38. This Court ruled that neither statute limited Power's recovery of damages under EMTALA. See Power v. Arlington Hosp. Ass'n, 800 F.Supp. 1384 (E.D.Va. 1992), *aff'd in part and rev'd in part*, 42 F.3d 851 (4th Cir. 1994). Following trial, the jury returned a verdict in Power's favor on the first EMTALA count and awarded damages of $5 million, and found in favor of the Hospital on the second EMTALA count.

The Hospital appealed the verdict to the Fourth Circuit on several grounds. In September 1992, while that appeal was pending, Power filed the case at bar, a

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dismissed the state-law counts without prejudice on the ground that the claims had not been subjected to the Virginia Malpractice Act's review processes, see Va. Code §§ 8.01-581.1, et seq. and on the alternative ground of the district courts' discretionary power to dismiss supplemental claims. See 28 U.S.C. § 1367(c); Power, 800 F.Supp. at 1387 n.5.

diversity action against the Hospital, Dr. Semmes, and APG for medical malpractice. The three defendants moved to dismiss Power's malpractice claim on the ground that it had not been evaluated by a medical malpractice review panel as required by Virginia law. See Va. Code § 8.01-581.2.[5] Although the malpractice claim had been submitted to a review panel pursuant to the statute, the panel's chairman had dismissed the claim after Power refused to testify at a scheduled deposition in London. When Power filed the instant malpractice action, the validity and effect of the chairman's ruling were still awaiting final decision in the Virginia courts, for Power had brought a state-court action seeking to overturn the chairman's decision, and the matter was pending on appeal before the Supreme Court of Virginia. Because issues relevant to the malpractice action were still being resolved in appeals in both the federal and state courts, the parties agreed to a

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[5] Virginia's Medical Malpractice Act provides a scheme by which malpractice complaints against health care providers may be reviewed by a panel consisting of attorneys, health care professionals, and a circuit court judge. The panel's opinion is admissible as evidence in any action subsequently brought by the claimant. See Va. Code §§ 8.01-581.1 50 -581.20. The Act was extensively revised in 1993 and 1994, but the provisions that are central to the case at bar were not affected.

consent order staying the malpractice action until the appeals' conclusion.

The Supreme Court of Virginia reached its decision first. It held that Power's attack on the panel chairman's ruling was premature. Because the panel review process is "a mere antecedent to a potential medical malpractice action," the Supreme Court held that the validity and effect of the chairman's actions were properly litigated only in a later malpractice action. Power v. Hendrick, 439 S.E.2d 345, 347 (Va. 1994)

Later that year, a divided panel of the Fourth Circuit rendered its decision on the EMTALA verdict against the Hospital. The Hospital's appeal was successful in only one respect. The panel's majority held that Power's damages under EMTALA were limited to $1 million by Virginia's statutory caps on medical malpractice and charitable hospital liability. See Power v. Arlington Hosp. Ass'n, 42 F.3d 851, 860-65 (4th Cir. 1994), *aff'g in part and rev'g in part* 800 F.Supp. 1384 (E.D. Va. 1992).[6] As a result, Power's $5 million verdict. against the Hospital was reduced

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[6] Chief Judge Ervin, in an opinion concurring in part and dissenting in part, agreed with this Court's view that recoveries under EMTALA are not subject to Either Virginia's medical malpractice damages cap or its charitable hospital liability limit. See Power, 42 F.3d at 869. The panel majority concluded otherwise. Id. at 860-65.

to a final order of judgment for $1 million.

Both appeals having concluded, Power's long-dormant malpractice action was revived. Power consented to dismissal of the Hospital on the ground it had already been held liable for $1 million in the EMTALA action. Given the Fourth Circuit panel's ruling that EMTALA damages count toward Virginia's malpractice and charitable hospital liability caps, further recovery from the Hospital was plainly barred by statute. The remaining defendants, Dr. Semmes and APG, then moved to dismiss, contending that Power's $1 million award constitutes the entire amount recoverable by her under Virginia's $1 million medical malpractice cap, regardless of which other defendants she might wish to sue or legal theories she might wish to raise. In response, Power contends that while a $1 million cap applies to her EMTALA award against the Hospital, a second $1 million cap, applies to her malpractice action against Dr. Semmes and APG. Both parties having fully briefed the issues presented by defendant's threshold dismissal motion, that motion is now ripe for decision.

II.

The parties' central disagreement concerns the operation and affect of Virginia's medical malpractice damages

cap. Interpretation of this or any statute properly begins with the statute's language. See United States v. Turkette, 452 U.S. 576, 580 (1981). Virginia's statute provides that "[i]n any verdict returned against a health care provider in an action for malpractice . . ., the total amount recoverable for an injury to, or death of, patient shall not exceed one million dollars." Va. Code § 8.01-581.15.[7] The statute further defines "malpractice" as "any tort based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient." Va. Code § 8.01-581.[8]

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[7] The statute provides, in pertinent part that:

> In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after October 1, 1983, which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed one million dollars.

[8] There is no dispute that both Dr. Semmes and APG are "health care providers," which the statute defines to include (i) a person of corporation licensed to provide health care or professional services as a physician, hospital, or health maintenance organization, and (ii) a

This plain and unambiguous statutory language announces the principle dispositive here: an injured patient may recover no more than $1 million for injuries arising from one malpractice events.[9] ' And, as the language also reflects, this principle holds whether the patient sues on defendant or many,

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professional corporation, all of whose shareholders or members are so licensed. See Va. Code § 8.01-581.1.

[9] The statute, it must be noted, uses the term "injury" in the singular. See Va. Code § 8.01-581.15. In ordinary parlance, one might say that Power suffered multiple injuries, since she incurred sever ham to many different parts of her body. But the word "injury" may also be used to refer collectively to constellation of hams arising from a particular act of treatment. A moment's reflection confirms that the statute uses the term in this sense, for acts of malpractice typically, if not always, result in numerous harms, which collectively are the malpractice injury. thus a negligent failure to diagnose tuberculosis might well result I a variety of harms, including fever, chills, night sweats, weight loss, appetite loss, weakness, coughing, and lesions of the lungs, bone, lymph nodes, and other organs. Surely, the General Assembly of Virginia did not intend that each of these hams is entitled to a separate $ 1 million recovery of the death of a patient, and it surely does not allow greater recovery to a patient who survives the same malpractice and suffers multiple symptoms, wounds or impairments. Thus, a second $1 million cap applies only when a patient suffers two distinct, divisible injuries from two separate malpractice episodes.

whether she files one action or several separate ones, or whether she proceeds under more than one legal theory or cause of action constituting "an action for malpractice" under the statute. Moreover, a patient cannot avoid the $1 million cap by characterizing each of the health care providers' mistakes that contribute to her injury as a separate instance of malpractice. The statute, which was intended to assure affordable medical malpractice insurance by limiting health care providers' liability, would be rendered ineffective and would not achieve its purpose if recovery could be multiplied as easily as Power suggests. In sum, one claimant, with one indivisible malpractice injury, is subject to a single $1 million cap on her malpractice damages.[10]

This conclusion finds firm support in prior opinions construing the statute. Thus, the Supreme Court of Virginia has held that the statute does not mean that a plaintiff can recover $1 million from

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[10] Power makes the textual argument that the statute provides a separate $1 million cap for each "verdict returned against a health care provider." Va Code § 8.01-581.15. This interpretation, which ignores the language providing that the "total amount recoverable for any injury" shall not exceed $1 million, has been squarely rejected by the Supreme Court of Virginia. See Etheridge v. Medical Ct. Hosps., 376 S.E.2d 525, 534-35 (V. 1989).

each health care provider involved, but instead imposes a damages cap of $1 million per malpractice injury. See Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 534-35 (Va. 1989). And a malpractice claimant may not avoid the cap limit simply by identifying additional health care providers as having contributed to the malpractice injury. In other words, if seven doctors' concurrent malpractice injures a patient, she may recover up to $1 million, not $7 million. thus, the fact that Power now sues Dr. Semmes and APG rather than, or in addition to, the Hospital does not entitle her to escape the cap's effect and recover more than the $1 million she has already been awarded.

The Supreme Court of Virginia has also made clear that a patient's recovery for one malpractice injury is limited to 41 million "regardless of the number of legal theories upon which claims are based." Bulala v. Boyd, 389 S.E.2d 670, 675 (Va. 1990).[11] Power unsuccessfully attempts to distinguish Bulala on the ground that negligence and EMTALA are not merely different "legal theories," but rather they are different "causes of

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[11] In Bulala, the Supreme Court of Virginia answered questions certified to it by the Fourth Circuit. See Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989); Boyd v. Bulala, 905 F.2d 764 (4th Cir. 1990).

action." this distinction is illusory. the circumstance of an injury may give rise to a variety of distinct cases of action, each of which constitutes "an action for malpractice" under the statute. Some may be based on state common law, such as negligence or battery, while others may arise from federal statutes such as EMTALA. The standards, remedies, and purposes of the causes of action may differ markedly. Yet, the statue provides that a single $1 million cap applies to all of a patient's "malpractice" claims, regardless of the particular theory or body of law on which the are based. It is therefore beside the point that, as Power repeatedly asserts, an EMTALA action is different from a negligence or traditional malpractice claims.[12]

There are several situations in which the statute does not limit recover to a single $1 million cap. None of these exists here. For instance, because the statute allows up to $1 million damages per patient, malpractice that injures more than one patient my give rise to liability greater the $1 million.

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[12] As the majority opinion in Power v. Arlington Hospital Association stated the "conclusion that Virginia's medical malpractice damages cap applies to Power's EMTALA calm . . . . does not undermine clear holdings . . . that EMTALA was not intended to displace state malpractice law." 42F2d at 864.

See Bulala, 389 S.E.2d at 675 (permitting total recovery of $2 million where malpractice proximately caused injury both to pregnant woman and her unborn child). Yet her, there is no dispute to only one patient involved.

In addition, the state only limits of affects a plaintiff's recovery on a claim that constitutes "an action for malpractice" against a "health care provider." VA Code § 8.01-581.15.[13] There can be no doubt that power's action against Dr. Semmes and APG is an action for medical malpractice. Nor is there any doubt now, given the majority opinion in Power v. Arlington Hospital Association, that Power's EMTALA claims against the Hospital also constitutes an action for malpractice under the statute. See 42 F.3d at 860-61. thus, Power has already recovered $1 million in what must be deemed an action for malpractice, namely her EMTALA suit, and therefore cannot recover further malpractice damages.

Finally, a plaintiff who is injured two or more times by distinct episodes of malpractice, is subject to separate $1

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[13] Cf. Glisson v. Loxley, 366 S.E.2d 68, 71-71 (Va. 1988) (holding that breach of contract claim, unlike battery claim, does not constitute "action for malpractice"); Fairfax Hosp. Sys. Inc. v. Nevitt, ___ S.E.2d ___, 1995 WL 232896 (Va. 1995) (considering effect of settlement by tortfeasor who was not "health care provider" on malpractice judgment obtained against hospital).

million cap for each injury. See Bulala 389 S.E.2d at 675 (single cap applies to each "indivisible injury"); Etheridge, 376 S.E.2d at 535 (same). Simple examples illustrate this point. If several surgeons make numerous errors during an operation that results in the patient's death, a single cap of $1 million applies. but if a person receives faulty treatment from her dentist, and later is injured by negligent surgery to her knee, she may recover up to $1 million for each of the two separate and divisible injuries.

In her malpractice action against Dr. Semmes and APG, Power seeks to recover damages for the same injury for which she already recovered $1 million form the Hospital under EMTALA. Each action is based on the treatment and diagnosis Power received from doctors at the Hospital's emergency room on February 24 and 25, 1990. This treatment and diagnosis all related to the same infection suffered by Power. The severe harm that Power suffered as a result of the EMTALA violation is inseparable form the injury that resulted from the alleged malpractice. Having suffered one indivisible set of injuries all stemming from the same malpractice event, Power is entitled to no more than $1 million under the statute.

This conclusion is not altered by the fact that Power can point to many separate and distinct acts by various

doctors and other parties in the course of her treatment. For example, Power emphasizes that the EMTALA verdict was based on the Hospital's failure to provide appropriate blood tests on the morning of February 24, but that her allegations against Dr. Semmes and APG in the malpractice action go further. She alleges that they misdiagnosed urinalysis results later that morning, that they provided her inadequate advice during telephone calls later that day, and that they again misdiagnosed and improperly treated her the following morning when her condition worsened and she returned to the Hospital. there is no question that Power's treatment involved many distinct acts, by several individuals, or that different acts were at issue in her EMTALA suite against the Hospital and in her malpractice complaint against Dr. Semmes and APG. Yet, contrary to Power's assertions, the statute does not apply a separate $1 million cap to each individual negligent act by health care providers, or to each visit and telephone call between patient and her doctors. Rather the statute only allows $1 million per injury, even if the injury arises form several wrongful acts during the course of treatment.

Despite the clear meaning of the statute's text and the case law interpreting it, Power contends that neither Congress nor the Virginia legislature could have intended that a $1

million EMTALA judgment against a hospital would prevent any and all recovery from physicians who committed malpractice. Power believes that the Hospital, physicians, and physicians groups involved in her treatment each should bear liability in fair proportion to their responsibility for her injury. None should escape liability simply because Power already obtained a $1 million judgment against the Hospital. According to Power, the problem is particularly acute where, as here, the doctrine of contribution does not operate to redistribute the burden of the $1 million judgment among the several culpable parties.

Power's assumption that the Hospital could not bring a successful contribution acting against Dr. Semmes or APG is highly questionable. By state in Virginia, "[c]ontribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." Va. Code § 8.01-34. Power was not required to allege of prove negligence to reveal on her EMTALA claim against the Hospital for disparate provision of health care services. See Power, 42 F.3d at 860-61; Lane v. Calhoun-Liberty County Hosp. Ass'n, 846 F.Supp. 1543, 1550-51 (N.D.Fla. 1994). Yet, the fact that Power was not required to prove negligence to recover under EMTALA does not mean that the events underlying her EMTALA claim did not

involve negligence. Thus, in her medical malpractice action, Power has clearly alleged that the harm she has suffered resulted from negligent actions of the Hospital, Dr. Semmes, and APG. If her allegations are true, the Hospital may persuasively argue for contribution on the ground that the wrong done to Power resulted from negligence.[14]

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[14] Power suggests not only that the Hospital cannot obtain contribution toward the $1 million judgment against it, but also that this situation is unique to cases involving EMTALA. This is not so. Battery, like a EMTALA claim, is a cause of action that requires no proof of negligence and, also like EMTALA, may constitute "malpractice" under Virginia's statute. See Pugsley v. Privette, 263 S.E.2d 69, 71 (Va. 1980) (negligence is not element of battery); Glisson v. Loxley, 356 S.E.2d 68, 72 (Va. 1968) (battery claim constitutes action for malpractice). Thus, there may be situations where a patient recovers $1 million in a battery or an EMTALA suit against a health care provider, no negligence was involved, and therefore a contribution action against other culpable health care providers, is not available under Virginia law. By contrast, where no showing of negligence was required to obtain a $1 million judgment for battery or an EMTALA violation, but negligence was nonetheless present, contribution may be available. Again, this result is neither unique to EMTALA cases nor persuasive evidence that the statutory cap must apply separately to each cause of action pursued by an injured patient. Moreover, to the extent that EMTALA claims do create unique inequities under the statute, this is merely an argument that it is wrong to apply the medical malpractice damages cap to EMTALA claims at all, a position already rejected by the Fourth Circuit panel

In addition, it is well-established under Virginia law, that "before contribution may be had it is essential that a cause of action by the person injured lie against the alleged wrongdoer from whom contribution is sought." Bartlett v. Roberts Recapping, Inc., 153 S.E.2d 193, 196 (Va. 1967). In other words, a contribution plaintiff (the Hospital) can obtain contribution only if the injured person (Power) had a cause of action against the contribution defendants (Dr. Semmes and APG). It is true that Power does not have a cause of action under EMTALA against Dr. Semmes or APG. See Power, 800 F.Supp. at 1386; supra note 3. But Power claims to have a valid claim against then for medical malpractice.[15] She assumes, without

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majority in Power v. Arlington Hospital Association. See 42 F.3d 860-64, *rev'g*, 800 F.Supp. at 1387-91.

[15] Of course, the Court concludes in this opinion that, even if Dr. Semmes and APG Committed malpractice, Power is now barred from recovering damages from them due to malpractice damages cap in § 8.01-581.15 and the $1 million EMTALA judgment against the Hospital. But the fact that Dr. Semmes and APG can no longer be held liable to Power for malpractice does not bar a contribution action by the Hospital against them. The Supreme Court of Virginia has held that "in order for contribution to lie, the injured party's cause of action against the third-party defendant need not *be* presently enforceable; it merely is necessary that the

authority, that the Hospital could not obtain contribution toward the EMTALA judgment from a party that was liable to Power under a cause of action other than EMTALA. Yet, Virginia courts have never indicated that the same cause of action by the injured person must lie against both the contribution defendants.[16]

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plaintiff, at some time in the past, have had an enforceable cause of action against the party from whom contribution is sought."' Genco-Ware, Inc. v. Rongene Mold & Plastics Corp., 360 S.E.2d 342, 344 (Va. 1987) (contribution claim is not barred by fact that it was asserted after statute of limitations expired on injured. person's cause of action against contribution defendant).

[16] Language in a few cases has implied that the Contribution plaintiff and contribution defendants must be liable to the injured party under the same cause of action. See, e.g. North River Ins. Co. v. Davis, 274 F.Supp. 146, 149 (W.D.Va. 1967) ("[T]he right to a contribution arises only when one of the joint tortfeasors has paid a claim for which other wrongdoer is also liable.") *aff'd*, 392 F.2d 571 (4th Cir. 1968). Yet, other cases have strongly suggest the opposite. for example, in Richmond F.& P. R.R. co. v. Davis Indus., Inc., 787 F.Supp 572 (E.D.Va. 1992), Washington Gas was held liable under the federal CERCLA statute and Virginia common law for dumping hazardous waste, specifically leaking air conditioners, on a railroad's property. Washington Gas sought contribution from the manufacturer of the air conditioners on the theory that the manufacturer was liable to the railroad for negligent manufacture and failure to warn of the air conditioners' hazards. Although the Court expressed skepticism about whether the Court

Rather, the have stated simply that the injured person's claims against each must relate to the same 'indivisible injury." Laws v. Spain, _ 312 F.Supp. 315, 318 (E.D.Va. 1967); American Tobacco Co. V. Transport Corp., 277 F.Supp. 457, 461 (E.D.Va. 1967); Virginia Elec. & Power Co. v. Wilson, 277 S.E.2d 149 150 (Va.1981); Norfolk S. R.R. Co. v. Gretaksi, 174 S.E. 841, 842 (Va. 1934).[17] Although its courts have never directly addressed the issue, Virginia thus appears to follow the rule adopted in other states that contribution is permitted where two or more persons are

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acknowledged that contribution could lie even if Washington Gas and the manufacturer were liable to the railroad for the same harm under different theories. See id. at 578.

[17] The reason that the injured person must have some cause of action against the target of the contribution claim is that a contribution action is merely redistributes liability, and cannot create liability that does not otherwise exist. See Laws, 312 F.Supp. at 318; Norfolk S. R.R., 174 S.E. at 842. In other words if the contribution defendant had no liability to the injured person, he should not be obligated to contribute toward paying a judgment won by the injured person. There is nothing in this rationale to suggest that contribution will not lie between two parties who are liable under different causes of action for one indivisible injury to another. If Dr. Semmes and APG in fact committed malpractice, allowing the Hospital to obtain contribution from them will not create liability where it never previously existed.

subject to liability for the same indivisible harm, though under different legal theories or causes of action.[18] In

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[18] The precedential weight of decisions from other jurisdictions is reduced by the fact that contribution is statutory right that is codified differently in various states. See, e.g., Va. Code § 8.01-34. Yet, the strong, consensus apparent in the case law is that, if both the contribution plaintiff and the contribution defendant are commonly liable for the same indivisible harm, there is no reason to require that the injured person have the same type of claim against each of them. See, e.g., Chicago, R.I. &P. R&R Co. v. Chicago & N.W. Ry. Co., 280 F.2d 110, 114 (8th Cir. 1960) (allowing contribution under Iowa law between two railroads liable for violations of different statutes) *cer. denied*, 364 U.S. 931 (1961); Wallace v. Strassel, 479 SE2d 231, 234 (Fla. Dist. Ct. App. 1985) (permitting dog owners subject to strict liability under statute to obtain contribution form party whose negligence contributed to same injury); Economy Eng'g Co. v. Commonwealth, 604 N.E.2d 694, 697 (Mass. 1992) (allowing party who is liable on theory of breach of warranty to obtain contribution from another whose negligence contributed to same injury); Farmers Ins. Exch. v. Village of Hewitt, 143 N.W.2d 230, 233 (Minn. 1966) (approving contribution where one party's liability rested on negligence and another was liable under dram shop act); Petersen v. Tolstow, 445, A.2d 84, 86 (N.J.Sup.Ct. Law Div. 1982) (allowing dog owner liable under statute to recover contribution form party liable for negligence); Aalco Mfg. Co. v. city of Espanola, 618 F.2d 1230. 1232 (N.M. 198)) (sustaining contribution between city liable under negligence theory and manufactures liable under strict product theory); Jakobleff v. Cerrato, Sweeney & Cohn, 468 N.Y.S.2d 894 (N.Y.App.Div.1983)

sum, if Dr. Semmes and APG committed malpractice, as Power alleges, they may wall be liable to the Hospital for contribution of a portion of the $1 million judgment.

In any event, it is unnecessary to resolve these novel questions of Virginia law here, because the operation of the malpractice damages cap plainly does not depend on the availability of contribution. The proportionality principle espoused by Power is simply not a part of the statute. The General Assembly of Virginia did not create an exception to allow a second $1 million of malpractice damages where necessary to insure a just and fair allocation of liability and wrongdoers. Nor did it provide for special treatment of cases in which the patients first recovery for malpractice is obtained pursuant to EMTALA or in any other manner that might preclude a subsequent contribution action. If § 8.01-581.15 of the Virginia code applies to EMTALA actions, as the Fourth Circuit panel held in Power's earlier case, it must apply to them in

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(allowing contribution between one party liable in contract and one liable in tort for the same harm); Sydenstricker v. Unipunch Products, Inc., 288 S.E.2d 511, 518 (W.Va. 1982) (recognizing that party may assert contribution claim against another party liable for same injury under different theory); see also 18 AmJur.2d Contribution, § 10 (1985)

the same manner as other malpractice actions. A patient who recovers $1 million in a negligence suit against one health care provider cannot recover more damages for the same injury from a second, even more culpable health care provider. See Etheridge, 376 S.E.2d at 534-35. Similarly, Power, having recovered $1 million from the Hospital under , cannot recover further malpractice damages from Dr. Semmes or APG.

III.

In sum, Virginia's statutory cap on medical malpractice damages prevents recover in this action.[19] As a result,

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[19] According to Power, the only legal principle under which the $1 million EMTALA judgment against the Hospital could conceivably bar recovery from Dr. Semmes and APG is the doctrine of issue preclusion, also known as collateral estoppel. Power argues at length that the required elements of issue preclusion are not satisfied here. This argument is neither persuasive nor entirely coherent. It is the statute, Va. code § 8.01-581.15, that bars further recovery. Defendants do not rely on issue preclusion, nor do they have any need to do so. Power also argues that defendants' position violates principles stated in cases in which a settlement reached with one tortfeasor is applied to offset a verdict against non-settling tortfeasors. *See, e.g.* McDermott, Inc. v. Amclyde, ___ U.S., 114 S.Ct. 1461, 1465-66 (1994); Hayman v. Patio Products, Inc., 311 S.E. 2d 752, (Va. 1984). These cases simply have no

the motion to dismiss filed by defendants Dr. Semmes and APG must be granted.

An appropriate order will issue.

s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

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application here. Again, it is the statute, rather than a prior settlement, that bars the recovery Power seeks.

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF VIRGINIA
ALEXANDRIA DIVISION

SUSAN M. POWER

v.

ARLINGTON HOSPITAL ASSOCIATION

CASE NUMBER: CA92-005-A

Entered August 8, 1992

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by Jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff, SUSAN M. POWER, against the defendant, ARLINGTON HOSPITAL ASSOCIATION, as claim 1 (the claim of inappropriate medical screening on or about 2/24/90) and damages awarded in the amount of $5,000,000.00 in accordance with the verdict of the jury.

Date: August 28, 1992

Doris R. Casey
Clerk
/s/Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SUSAN M. POWER
246 Willesden Lane
London NW2 SRE
ENGLAND,

Plaintiff,

v.

ALEXANDRIA PHYSICIANS GROUP, LTD.
8101 Hinson Farm Road
Suite #318
Alexandria, Virginia 22306
Serve:
William L. Dempsey
Registered Agent
9685 E. Main Street
Fairfax, Virginia 22031

and

BENEDICT J. SEMMES, M.D.
159 Quincy Street
Chevy Chase, Maryland 20815

and

ARLINGTON HOSPITAL ASSOCIATION
1701 North George Mason Drive
Arlington, Virginia 22205

Serve:

James L. Rieder
President and Registered Agent
1701 North George Mason Drive
Arlington, Virginia 22205,

Defendants.

COMPLAINT FOR MEDICAL MALPRACTICE

COMES NOW the plaintiff, Susan M. Power, through counsel and as and for her Complaint herein states as follows:

I. JURISDICTION AND VENUE

1. This Court has original, diversity jurisdiction for plaintiff's claim against the defendants Alexandria Physicians Group, Ltd. ("Alexandria Physicians Group"), Benedict J. Semmes, M.D. ("Semmes"), and Arlington Hospital Association ("Arlington Hospital"), pursuant to 28 U.S.C. § 1332 (a)(2).

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 (a)(2), since the events or omissions giving rise to this claim occurred in this judicial district.

3. The matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs.

II. PARTIES

4. Plaintiff Susan M. Power is a citizen of the United Kingdom, with permanent residence in England.

5. Defendant Alexandria Physicians Group, Ltd., is a corporation organized under the laws of the Commonwealth of Virginia with its principal place of business in Alexandria, Virginia.

6. Defendant Benedict J. Semmes, M.D., is a citizen and resident of the State of Maryland.

7. Defendant Arlington Hospital Association is a corporation organized under the laws of the Commonwealth of Virginia with its principal place of business in Arlington, Virginia.

III. PROCEDURAL BACKGROUND

8. On January 2, 1992, plaintiff, by certified mail, provided written notice to the defendant health care providers Semmes, Alexandria Physicians Group, and Arlington Hospital that plaintiff was contemplating the instant action for medical malpractice resulting from the defendants' acts and omissions on or about February 24, 1990.

9. On February 24, 1992, the Chief Justice of the Supreme Court of Virginia appointed a Medical Malpractice Review Panel, pursuant to the request of one or more health care providers, and in accordance with Va. Code § 8.01-581.2.

10. More than six months have passed since the Medical Malpractice Review Panel was designated. Therefore, pursuant to Va. Code § 8.01-581.7:1, plaintiff may now pursue her remedies at law under the Virginia Medical Malpractice Act, Va. Code §§ 8.01-581.1 through 581.20.

IV. FACTUAL BACKGROUND

11. On or about February 24, 1990, defendant Alexandria Physicians Group operated the Emergency Department of Arlington Hospital, under contract with Arlington Hospital to provide emergency care services to patients presenting themselves for treatment in the emergency room of Arlington Hospital.

12. On or about February 24, 1990, defendant Semmes was employed by Alexandria Physicians Group, and held himself out as a competent emergency room physician capable of skillfully treating and diagnosing patients who presented themselves for treatment at the Arlington Hospital emergency room.

13. On or about February 24, 1990, defendant Semmes was present in the emergency room of Arlington Hospital, was working as the emergency room physician at Arlington Hospital, and was a physician responsible for the examination and treatment of Susan Power.

14. On or about February 24, 1990, defendant Semmes was the actual or ostensible agent or servant of the Alexandria Physicians Group for all acts and omissions he performed while working in the emergency room of Arlington Hospital.

15. At all times pertinent hereto, Semmes was acting within the scope of his authority, and within the scope of his employment, as the actual or ostensible agent or servant of Alexandria Physicians Group and Arlington Hospital.

16. On or about February 24, 1990, defendant Alexandria Physicians Group was the actual or ostensible agent of Arlington Hospital for all acts and omissions performed by the Alexandria Physicians Group or its agents and employees while performing emergency room care at Arlington Hospital.

17. On or about February 24, 1990, defendant Alexandria Physicians Group was a licensed health care provider as such term is used and defined in Va. Code § 8.01-581.1.

18. On or about February 24, 1990, defendant Arlington Hospital was a licensed health care provider and hospital as such terms are used and defined in Va. Code § 8.01-581.1.

19. On or about February 24, 1990, defendant Semmes was a licensed health care provider and physician as such terms

are used and defined in Va. Code § 8.01-581.1.

20. On or about February 24, 1990, Susan M. Power was a patient of defendants Semmes, Alexandria Physicians Group, and Arlington Hospital, as such term is used and defined by Va. Code § 8.01-581.1.

21. At approximately 5:45 a.m. on February 24, 1990, Susan M. Power was transported to the Arlington Hospital emergency room for treatment of an emergency medical condition. Ms. Power requested defendants Semmes, Alexandria Physicians Group, and Arlington Hospital provide her health care, as such term is used and defined in Va. Code § 8.01-581.1.

22. Upon arrival, Ms. Power could not walk and entered the Arlington Hospital emergency room in a wheelchair provided by Arlington Hospital. Ms. Power was immediately taken to an emergency room for examination.

23. Upon presenting herself to the emergency room for treatment and examination, Ms. Power complained of chills, fever, excruciating left hip pain, lower abdominal pain, pain in her back and running down the left leg, and an inability to walk. She denied any trauma or similar cause of the pain; related her medical history, including a large existing boil below her ear lobe; and advised the she could not stop

shaking and could not get warm. Ms. Power related each of these symptoms to the health care providers who examined and treated her on February 24, 1990.

24. Ms. Power was first examined by Mitchell Heiman, M.D., who ordered a hip x-ray of Ms. Power. Dr. Heiman was also an agent and employee of Alexandria Physicians Group and of Arlington Hospital. Dr. Heiman left the emergency room at approximately 7:00 a.m., at the end of his shift, without reviewing the x-ray or radiology report, and without diagnosing Ms. Power's condition. Dr. Heiman provided no further examination or treatment of Ms. Power. Ms. Power was next examined by defendant Semmes, whose shift followed Dr. Heiman's.

25. Semmes ordered a urine analysis, and later discharged Ms. Power from the emergency room before the report of the urine analysis was completed. Semmes was unable to determine the cause of the plaintiff's complaints before discharge, and so indicated that on the plaintiff's medical chart. Other than a cursory neurological examination, no further examination or treatment was provided to Ms. Power by defendants Semmes, Alexandria Physicians Group, or Arlington Hospital on February 24, 1990, prior to her involuntary release and discharge. Defendants Semmes, Alexandria Physicians Group and Arlington Hospital discharged Ms. Power in an unstable medical condition without diagnosing or

treating the cause of her emergency medical condition.

26. Upon discharge, defendant Semmes gave Ms. Power a prescription for Naprosyn and Percocet. The prescription was on Arlington Hospital stationery. The prescription was promptly filled. Ms. Power took the medication according to the directions provided, without relief to her condition or symptoms.

27. Upon release from the emergency room on February 24, 1990, Ms. Power could not walk and had to be carried out of the emergency room in a wheelchair. Ms, Power's condition and symptoms were not improved upon discharge.

28. During the next thirty-six hours following Ms. Power's discharge from the emergency room, the defendants Semmes, Alexandria Physicians Group, and Arlington Hospital received at least four telephone calls from a friend of Ms. Power informing the defendants that Ms. Power's symptoms continued that she was not improved, and that her condition was deteriorating. In response to one of the initial calls, the defendants suggested that Ms. Power double the dosage of the medication. Ms. Power followed the medical advice. During a subsequent call, the defendants were informed that Ms. Power's condition had worsened. Defendant Semmes suggested that Ms. Power continue to take the previously prescribed medication, based solely on a telephone call. Defendant Semmes wrote

an additional prescription, since the initial prescription was almost out. At no time did the defendants suggest that Ms. Power should return to Arlington Hospital for further examination or treatment.

29. On the evening of February 25, 1990, Ms. Power suffered septic shock as a result of the failure of the defendants to properly diagnose and treat the plaintiff.

V. MEDICAL MALPRACTICE

30. Plaintiff Susan M. Power incorporates herein by reference paragraphs 1 through 32 and hereby alleges the following:

31. Defendants Alexandria Physicians Group, Semmes, and Arlington Hospital had a duty to adequately and properly examine, diagnose, and treat Ms. Power's medical condition, and to provide health care, within the standard of care, for the conditions with which she presented on February 24, 1990. That duty continued, as a result of continued, repeated calls from Ms. Power's friend.

32. Defendants Alexandria Physicians Group, Semmes, and Arlington Hospital failed to adequately and properly examine, diagnose, and treat Ms. Power's medical condition, within the standard of care, on February 24, 1990, and thereafter, as their duty to Ms. Power continued. Among other things, the

defendants failed to notice, acknowledge, document, address and account for the triage nurses' notes and findings; failed to notice, acknowledge, document, address and account for Ms. Power's inability to walk; failed to diagnose Ms. Power's excruciating pain which had not source or trauma; failed to consider infection as a differential diagnosis; failed to perform lab work to detect infection; failed to notice, record, or consider the large boil on Ms. Power's right jaw; failed to perform a pelvic examination; failed to perform a CBC; failed to perform a Chem. 7 blood test; failed to perform a blood culture; failed to provide for adequate and appropriate consultation; failed to obtain a clean urine specimen and failed to call for another specimen when it became apparent the first specimen was not a "clean catch"; ignored the presence of ketone in the urine specimen; failed to report the results that were obtained from the urine culture; failed to do a SED rate; failed to assess the etiology of Ms. Power's inability to walk and her pain; failed to perform a lymph node examination; failed to perform a microscopic examination of the urine; failed to take adequate and appropriate x-rays of the septic joints; failed to do an MRI examination; failed to do a CAT scan examination; improperly prescribed medication without first determining the etiology of the patient's condition; failed to provide for adequate follow-up

instructions in the event that the condition worsened or a further dangerous condition developed; failed to diagnose a septic joint; discharged the patient with the described symptoms before receiving lab results and prior to stabilizing her medical condition, without adequate treatment and without provisions for her to obtain adequate treatment at another medical facility. The actions and omissions of defendants Semmes, Alexandria Physicians Group, and Arlington Hospital were outside the standard of care, and constituted negligence and medical malpractice.

33. Defendants Arlington Hospital, Alexandria Physicians Group, and Semmes failed to comply with the Joint Commission on Accreditation of Hospital's Standard MR.1, including, but not limited to, MR.1.2.4, MR.1.3 and MR.1.6, in that the original medical records of Susan Power's February 24, 1990, emergency room visit were lost.

34. On February 25, 1990, Ms. Power was again presented to the emergency room of Arlington Hospital for examination and treatment of her emergency medical condition. Ms. Power was suffering from septic shock. Her vital signs had deteriorated, including a blood pressure of 60 over palpable. Ms. Power was thereupon immediately admitted to Arlington Hospital's Intensive Care Unit, where she remained for the next five months.

35. Ms. Power was subsequently discharged from Arlington Hospital on July 1, 1990. She was transferred from the Arlington Hospital Intensive Care Unit to the Central Middlesex Hospital in London, England, on board a commercial air carrier.

36. Ms. Power's damages include, but are not limited to, the following: bilateral below-the-knees amputations; loss of sight in one eye; loss of use of her right hand; a pneumothorax and pneumocals in her left lung resulting in permanent and irreparable lung damage; probable permanent brain damage; tracheotomy and related pain and suffering caused by prolonged use of a ventilator; significantly increased risk of developing cancer; significantly increased risk of contracting AIDS; hypertension; disseminated intervascular coagulopathy; staph pneumonia; adult respiratory distress syndrome (ARDS); bilateral ischemia of the lower extremities with dry gangrenous; paralytic ileus; enterococcus line sepsis; acute renal failure necessitating the use of kidney dialysis; anemia and coagulopathy; malnutrition; abnormal liver function, secondary to shock.

37. The personal injuries of Susan Power, both physical and mental, have resulted in the following: reduced life expectancy; the permanent reduction of earning potential; acute and chronic medical conditions necessitating

continued medical treatment and examination for the remainder of her life; the need for extensive occupational, pulmonary, and vocational rehabilitation; the use of bilateral prostheses; the need for transportational and architectural modifications to accommodate her physical limitations; the need for permanent in-home medical and personal services. Additionally, Ms. Power has suffered and will continue to suffer extreme pain, humiliation, emotional distress disfigurement, and significant monetary expenses related to her permanent disfigurement and her past and future acute, chronic and permanent medical and psychological conditions.

WHEREFORE, plaintiff Susan M. Power prays that she recover judgment against defendants Alexandria Physicians Group, Semmes, and Arlington Hospital, jointly and severally, in the sum of one million dollars ($1,000,000.00) compensatory damages with interest from February 24, 1990, and her costs in this action.

Respectfully submitted,

/s/ William F. Causey

/s/ James M. Falk, Jr.

/s/ Scott A. Mills (Va. Bar # 28022)
FALK & CAUSEY
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Counsel for Susan M. Power

DATED: September 11, 1992